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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

NO. _____

STATE BANK OF ST. CHARLES, as Administrator of the Estate of CHRISTOPHER A. WARD, Deceased,
PETITIONER,

V.

DAVID CAMIC, PATRICK AHLGREN, DONALD STIMSON, DAN PETERSON, and THE CITY OF AURORA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 11, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Aurora Police Department violated Ward's constitutional rights by incarcerating him without the opportunity of making a phone call when Ward repeatedly asked to make a phone call and when Ward had been or was simultaneously charged with a misdemeanor.

2. Whether sufficient facts were presented as to the violations of Ward's Fifth, Sixth, Eighth and Fourteenth Amendment rights to establish genuine issues of material fact as to whether Ward suffered a constitutional deprivation at the hands of the Aurora Police Department.

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CITATIONS

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The petitioner, State Bank of St. Charles, as Administrator of the Estate of Christopher A. Ward, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, ("Court of Appeals") affirming the summary judgment granted the defendants

David Camic, Patrick Ahlgren, Donald Stimson, Dan Peterson and the City of Aurora by the United States District Court, Northern District of Illinois, Eastern Division ("District Court").

REPORTS OF OPINIONS BELOW

The opinions of the Court of Appeals, State Bank of St. Charles v. David Camic, et al, 712 F.2nd 1140 (7th Cir. 1983), and the District Court, State Bank of St. Charles v. David Camic, et al, No. 79 C 2714, (N.D.Ill., Oct. 1, 1982) (unpublished), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1983. This petition for certiorari is filed within 90 days of that date. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Aurora Police Department violated Ward's constitutional rights by incarcerating him without the opportunity of making a phone call when Ward repeatedly asked to make a phone call and when Ward had been or was simultaneously charged with a misdemeanor.

2. Whether sufficient facts were presented as to the violations of Ward's Fifth, Sixth, Eighth and Fourteenth Amendment rights to establish genuine issues of material fact as to whether Ward suffered a constitutional deprivation at the hands of the Aurora Police Department.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following amendments to the United States Constitution and Statutes are involved in this writ:

1. U.S.C.A. Const. Amend. V, p.4.

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

2. U.S.C.A. Const. Amend. VI, p.4.

> "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense."

3. U.S.C.A. Const. Amend. VIII, p.758.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. U.S.C.A. Const. Amend. XIV, § 1, p.33.

> "Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law."

5. 42 U.S.C.A. § 1983, p.15.

> "Civil action for deprivation of rights
> "Every person who, under color

of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

6. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C., p. 15.

"(c) Motion and proceedings thereon

"... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT OF THE CASE

The District Court had original jurisdiction of this action under 28 U.S.C.A. §1343.

Christopher Ward, the decedent, was involved in a minor traffic accident at approximately 6:00 p.m. on May 28, 1979. [Appendix (1) p.vi] In response to a call for assistance from the first officer at the scene, officer Camic arrived at the scene and arrested Ward for driving with a suspended license, a Class A misdemeanor requiring a $100.00 bond, [Appendix (1) p.vi], for failure to reduce speed, (Camic Dep. R.281), and for obstructing service of process and resisting arrest. (Camic Dep. R.264) Prior to transport to the Aurora Police Station, Ward was struck by officer Camic. (Camic Dep. R.272) Upon arrival at the Aurora Police Station,

officers Ahlgren and Turnbow sought information from Ward in completing a booking form. [Appendix (1) p.vii] During the booking procedure, Ward repeatedly demanded the right to make a phone call. [Appendix (1) p.vii] The officers repeatedly denied Ward the right to a phone call. Officer Ahlgren told the Aurora Police Department supervisor, Lieutenant Olin, that Ward would only give his name and address, (although 20 of the 25 questions in the booking form were completed) and Ahlgren marked the booking sheet that Ward had "refused" to make a phone call. [Appendix (1) p.vii-viii] Olin told Ahlgren to lock Ward in a cell. Ward's property, belt and shoelaces were forcibly removed and he was locked in a cell out of sight of the booking area. [Appendix (1) p.viii] A routine cell

check approximately one hour later disclosed that Ward had ripped his shirt into five pieces of cloth and made a rope with which he hung himself. [Appendix (1) p.ix] A monitoring system of the cells was either inoperative at the time Ward committed suicide or the post from which auditory surveilance could be monitored was vacant. [Appendix (1) p.x] When discovered, he had been dead of strangulation for approximately 30 minutes. [Appendix (1) p.ix]

At some point between the time the writing of the tickets commenced at the scene of the accident, (Camic Dep. R.281) and the death, Ward was charged with one and perhaps two misdemeanors. (Camic Dep. R.271, 275)

Relevant policies and regulations of the Aurora Police Department require that a person be afforded a reasonable

number of phone calls before confinement, and that cells should be checked every hour. [Appendix (1) p.x]

REASONS FOR GRANTING THE WRIT

1. The Aurora Police Department violated Ward's Sixth Amendment Constitutional rights to an attorney by incarcerating him without the opportunity of making a phone call when Ward repeatedly asked to make a phone call and when Ward had been or was simultaneously charged with a misdemeanor.

The opinion of the Court of Appeals, relying on Kirby v. Illinois, 406 U.S. 682 (1972), is that because Ward was denied counsel before there were adversarial judicial proceedings, his constitutional right to counsel was not violated. [Appendix (1) p.xvi] In Kirby v. Illinois, 406 U.S. 682 (1972),

it was held that the initiation of adversary judicial criminal proceedings -- by the way of formal charge, preliminary hearing, indictment information or arraignment is the point at which the Sixth Amendment right to counsel attaches. Id. at 689-690. It was the opinion of the Court of Appeals that even considering that the Aurora Police Department regulations require the person in custody to be allowed a phone call before incarceration, Ward had no Sixth Amendment right to a phone call absent an effort to interrogate him or actions by the Aurora Police Department that could be characterized as the initiation of adversary judicial proceedings. [Appendix (1) p.xviii]

However, the Court of Appeals is in error in characterizing the facts. As the record indicates, Ward was charged

with a Class A misdemeanor of driving with a suspended license and also with failure to reduce speed. [Appendix (1) p.vi, Camic Dep. R.281] Additionally, the deposition of Officer Camic indicates that he charged Ward with resisting arrest. (Camic Dep. R.264) Camic testified that he commenced writing tickets on the aforementioned offenses at the scene when Ward was arrested and that he completed the tickets or, at least one of the tickets, at some time during the booking process but prior to the death of Ward. (Camic Dep. R.271) He is not certain when the other ticket was completed. (Camic Dep. R.271)

Clearly, contrary to the view of the Court of Appeals, adversary judicial proceedings were instituted against Ward for the writing of the ticket is the

formal charge. As a consequence, having been formally charged, the full range of Constitutional protections under Escobedo v. Illinois, 378 U.S. 478 (1964) come into play. In Escobedo v. Illinois, 378 U.S. 478 (1964) the Supreme Court held that when a police investigation is no longer "a general inquiry into an unsolved crime but has begun to focus on a particular suspect", when the suspect is in police custody, when the police initiate a process of interrogation that lends itself to eliciting incriminating statements, when a suspect has requested and been denied the right to counsel and when the police have not warned the suspect of his right to remain silent, then the suspect has been denied assistance of counsel in violation of the Sixth Amendment to the Constitution. Id. at 491. It is

incontrovertable that Ward was arrested and formally charged with an offense, in custody, subject to interrogation and denied the right to a telephone call. It seems absurd to suggest that because the defendants state that forceful custodial interrogation related only to booking questions that there is no genuine issue of fact as to whether the initiating of this interrogation could lend itself to eliciting incriminating statements. This matter comes to this Court, not after a hearing by the trier of fact but on a dismissal under a motion for summary judgment. While the depositions of the defendant officers indicate that the defendant was pressured and forced only to complete the booking form, the deceased plaintiff has been denied his day in court to test the limits of this testimony. Because

Ward was clearly in a custodial environment charged with a misdemeanor, because he was incarcerated without being allowed to make a telephone call, and subjected to vigorous questioning his Sixth Amendment Constitutional rights have been abridged by the Aurora Police Department and identified officers.

2. Sufficient facts were presented as to the violation of Ward's Fifth, Sixth, Eighth and Fourteenth Constitutional Amendment rights to establish genuine issues of material fact as to whether Ward suffered a constitutional deprivation at the hands of the Aurora Police Department.

Summary judgment is a drastic relief which should be granted only very sparingly. Ames v. Vavrech, 356 F.Supp. 931 (D.C. Minn. 1973).

Under Rule 56(c) of the Federal

Rules of Civil Procedure, 28 U.S.C.A. 56(c), summary judgment is appropriate only when:

> "... the pleadings, depositions, answers to interrogatories, and admissions on file, ... show that there is no genuine issue as to any material fact... ."

Plaintiff is entitled to have evidence viewed in a light most favorable to it. Trotter v. Anderson, 417 F.2d 1191 (C.A. Ill. 1969).

Ward was allegedly denied the right to make a phone call because he did not furnish booking information. [Appendix (1) p.vii] The record however shows that he furnished almost all information required. [Appendix (1) p.vii] Officer Ahlgren marked the booking form that Ward had refused to make a phone call and told Officer Olin that Ward had provided only his name and address. [Appendix (1) p.viii] Ward was a

material witness in an act of alleged police brutality by Officer Camic, the officer who struck Ward at the scene of the accident. [Appendix (1) p.xli, vii; Brent Dep. R.242] Ward was dragged to a cell and incarcerated despite Aurora Police Department regulations requiring that he be allowed a phone call. (Brent Dep. R. 217, 219-220, 223, 224, 225) A notation on the booking form indicated that Ward was acting "freaky" and was obviously intoxicated. [Appendix (1) p.vi, ix]

No officers are stationed in the cell block. [Appendix (1) p.xl] However, the auditory monitoring device of the Aurora Police Department allows one to hear noises such as coughing, urinating and talking. [Appendix (1) p.xl; Stimpson Dep. R.415-416] Unbelieveably, despite the fact that

prisoners, cells away heard Ward banging his body against the cell and ripping cloth, for the entire period that Ward hung chocking against the bars of the cell, no officer heard a sound. (Godinez Dep. R.298-300; Camic Dep. R.283; Peterson Dep. R.386) No officer, in violation of regulations, checked the cells until Officer Stimson discovered Ward's body approximately one hour after incarceration. [Appendix (2) p.xli]

The District Court and Court of Appeals isolated each constitutional deprivation, wrongly reviewed the facts in a manner favoring the moving party, and found that each deprivation did not meet constitutionally protected levels.

Sixth Amendment. Sixth Amendment violations have been discussed in the first argument.

Eighth Amendment. This court has

held that deliberate indifference to medical needs and services of prisoners is an "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976) [Quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)] The District Court and Court of Appeals usurped the role of the trier of fact in determining that there was no possibility that the actions of the police could be characterized as deliberate or callous indifference. [Appendix (1) p.xxvi] When state of mind, intent and motive are central issues, summary judgment should be granted only in the clearest of cases. DePriest v. Seaway Food Town, Inc., 543 F.Supp. 1355 (D.C. Mich. 1982) Might not a jury find deliberate and callous indifference in the untruths of Officer Algren which catapulted an intoxicated

man acting "freaky" into a cell? Might not it strain the credulity of a jury that the death of Ward occurred unnoticed? The trier of fact should be allowed to determine whether the Eighth Amendment rights of Ward were violated.

Fifth and Fourteenth Amendments. It is the sum of all of the facts, the totality of the circumstances, step by step, that constitute the deprival of the life and the liberty of Christopher Ward without due process of law. Whether the record as a whole establishes constitutional deprivation is best resolved by the trier of fact.

Clearly at issue are constitutional deprivations: The Sixth Amendment right to counsel; the Eighth Amendment prohibition of cruel and unusual punishment and the due process of law safeguards in the Fifth and Fourteenth

Amendments. The wrongs to Christopher should not be compounded by denying the opportunity to be fairly heard by the trier of fact.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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October 11, 1983

APPENDIX

(1) Opinion by Judge Pell

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 13, 1983.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. WILLIAM J. JAMESON, Senior District Judge*

STATE BANK OF ST. CHARLES, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 79 C 2714 Judge Charles P. Kocoras
No. 82-2781 vs.	)	
DAVID CAMIC, et al., Defendants-Appellees	)	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

* The Honorable William J. Jameson, Senior District Judge of the District of Montana, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 82-2781

STATE BANK OF ST. CHARLES, as Administrator of the Estate of CHRISTOPHER A. WARD, Deceased,

Plaintiff-Appellant,

v.

DAVID CAMIC, PATRICK AHLGREN, DONALD STIMSON, DAN PETERSON, and THE CITY OF AURORA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 2714-Charles P. Kocoras, Judge.

ARGUED APRIL 6, 1983
DECIDED JULY 13, 1983

Before PELL and ESCHBACH, Circuit Judges, and JAMESON, Senior District Judge.*

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* The Honorable William J. Jameson, Senior District Judge of the District of Montana, sitting by designation.

PELL, Circuit Judge. The State Bank of St. Charles (Bank), suing on behalf of the estate of Christopher A. Ward (Ward), deceased, appeals from the district court's grant of summary judgment in favor of the City of Aurora, Illinois, and individually named Aurora police officers. The principal issue on appeal is whether questions of material fact exist relevant to the Bank's claims that the defendants violated Ward's constitutional rights by prohibiting him from making a phone call prior to their placing him into a cell and/or failing adequately to supervise Ward so as to prevent his committing suicide while he was incarcerated.

I. FACTS

A. The Parties

Ward, upon whose behalf the Bank

sues, committed suicide while incarcerated in a cell at the City of Aurora, Illinois, police department on May 28, 1979. Defendants David Camic, Patrick Ahlgren, Donald Stimson, and Dan Peterson are police officers who were in the employ of the City of Aurora on the date of Ward's death. As developed below, Camic was the officer responsible for arresting Ward for driving with a suspended driver's license, following Ward's involvement in a minor traffic accident. Ahlgren was one of two officers who drove Ward from the scene of the accident to the police station and who attempted to gain from Ward the information required to complete the department's booking form. Stimson was a booking officer whose duties included conducting regular cell checks. Peterson

was voluntarily dismissed from this action and is not involved in this appeal.

B. Events of May 28, 1979

Ward was involved in a minor automobile accident at approximately 6:00 P.M. In response to a call for assistance from the first officer at the scene, Camic arrived at the site of the accident approximately fifteen minutes later. He arrested Ward for driving with a suspended license, a Class A misdemeanor requiring a $100.00 bond. Because Ward was obviously intoxicated, Camic called for a vehicle to transport Ward to the police station. Ahlgren, along with officer Turnbow, arrived in a squad car. Camic, Turnbow, and Ahlgren attempted to search Ward. Ward resisted their efforts both to search him and to

put him into the squad car. According to Camic, Ward attempted to strike him. Camic, in return, struck Ward in the stomach.

Ward, together with Ahlgren and Turnbow, arrived at the booking room of the Aurora Police Department (APD) sometime between 6:30 P.M. and 6:45 P.M. The two officers sought information from Ward in order to complete the booking form. Although eventually twenty of the twenty-five boxes on the form were completed, Ward allegedly refused to cooperate with the booking formalities. Throughout the procedure, Ward repeatedly demanded the right to make a phone call. Turnbow informed him that he would be permitted a call when the booking formalities were completed.

Lieutenant Olin, an APD supervisor,

arrived in the booking area while the officers were attempting to elicit information from Ward. He witnessed Ward's lack of cooperation. Olin was also apparently told by Ahlgren that the only information they could obtain from Ward was his name and address. Olin then told Ahlgren to lock Ward in a cell. Ward again became abusive and violent, kicking Ahlgren and generally resisting while the officers removed his property, including his belt and shoe laces, and took him to a cell out of sight of the booking area.

The three officers left the cell area at approximately 6:55 P.M. After leaving the cell area, Ahlgren marked on the booking sheet that Ward had "refused" to make a phone call. According to Ahlgren, this characterization reflected

his view that Ward could have made a phone call had he cooperated with the officers in completing the booking form. A notation on the form was also made that Ward was behaving in a "freaky" manner.

Stimson had gone to dinner about 6:45 P.M. He did not then know of Ward's incarceration. Stimson returned about 7:40 P.M. After assisting another officer in fingerprinting a prisoner, Stimson began a routine cell check. At 7:47 P.M., Stimson discovered Ward dead in his cell. Ward had ripped his shirt into five pieces of cloth and made a rope with which he hanged himself. At the time Stimson discovered Ward, he had been dead of strangulation approximately thirty minutes.

C. Relevant Policies and Regulations of the APD

The APD requires that a person be afforded a reasonable number of phone calls before he is confined. These calls are to be made within a "reasonable" time which is defined as meaning within the first hour after arriving at the place of custody. The APD regulations also state that cells are to be checked every hour and that every person "should be considered as a potential suicide victim."

D. Proceedings Below

The district court granted summary judgment to the defendants on the grounds that neither delaying Ward's phone call until he became more sober nor failing to prevent Ward's suicide constitutes a constitutional deprivation.

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The district judge stated: "Because the uncontested facts fail to establish any wrongdoing by the defendants beyond an isolated omission to supervise the prisoner, the claim involves simple negligence at best that does not rise to the level of a constitutional deprivation."

II. MERITS

In Parratt v. Taylor, 451 U.S. 527 (1981), the Supreme Court stated that:

> "[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States."

Id. at 535. Because it is conceded that the defendants were acting under color

of state law, this court's task on review focuses on the second prong of the Parratt test. We must determine whether the district judge correctly determined that no genuine issue of material fact existed as to whether Ward suffered a constitutional deprivation at the hands of the APD.[1] The Bank alleges violations of Ward's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. We address in turn whether: (1) Ward's Sixth Amendment right to counsel was abridged; (2) the arrest and confinement

[1] The Parratt Court determined that 42 U.S.C. § 1983 embodies no state of mind requirement. 451 U.S. at 534. Although Parratt was decided before the district court opinion in this case issued, the parties have devoted considerable attention in their briefs before this court to whether the conduct alleged was "negligent" or "reckless." In light of Parratt, as well as previous precedent in this court eschewing analysis grounded solely on such labels, see Spence v. Staras, 507 F.2d 554, 556 n.1 (7th Cir. 1974), we decline to follow such an approach in this case.

of Ward that culminated in his suicide deprived him of the Eighth Amendment right to be free from cruel and unusual punishment; and (3) Ward's Fifth and Fourteenth Amendment rights not to be deprived of liberty without due process of law were violated by the APD. Finally, we discuss whether a claim based on alleged violations of state tort law is cognizable in this action.

In determining whether genuine issues of material fact exist, only those inferences that follow reasonably from the evidence must be construed in favor of the party against whom the motion is made. E.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 349 (7th Cir. 1983).

A. Right to Counsel

In Escobedo v. Illinois, 378 U.S. 478 (1964), the Supreme Court held that the right of an accused person to consult an attorney of his choosing attaches "when the process shifts from investigatory to accusatory - when its focus is on the accused and its purpose is to elicit a confession." Id. at 492. In Escobedo, the police had interrogated the defendant at length about the murder of which he was accused. In the course of the interrogation, Escobedo implicated himself in the crime. Escobedo had repeatedly asked to see his attorney and had been misinformed by the police that his lawyer didn't want to see him.

Escobedo does not support the Bank's claim that Ward's Sixth Amendment right to consult an attorney was

violated in the present case. As the Supreme Court has subsequently noted, the prime purpose of Escobedo was to guarantee the "'full effectuation of the privilege against self-incrimination'" rather than to "vindicate the constitutional right to counsel as such." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)). There is no contention whatsoever that the questions asked of Ward prior to his incarceration aimed to elicit a confession or otherwise cause him to incriminate himself. The questions pertained solely to the biographical data required for completion of the booking form.

Further, any argument that this routine line of questioning could be characterized as accusatory rather than

investigatory, and therefore within the purview of the constitutional right to counsel, is precluded by Kirby v. Illinois, 406 U.S. 682 (1972). In Kirby, the Court rejected the argument that the petitioner should have been advised of his right to counsel prior to a pre-indictment "show-up." The Court held that the initiation of adversary judicial criminal proceedings - by way of formal charge, preliminary hearing, indictment, information or arraignment - is the point at which the Sixth Amendment right to counsel attaches. Id. at 689-90.

In this case, the alleged deprivation of counsel occurred before any adversary judicial proceedings were instituted. Under Kirby, Ward's right to counsel was not violated by postpon-

ing his right to a phone call until completion of the booking form bearing in mind his intoxicated condition. The period of time involved was not unreasonable.

The case on which the plaintiff principally relies, State v. Krozel, 24 Conn. Supp. 266, 190 A.2d 61 (1963), does not alter this conclusion. In Krozel, the defendant was interrogated, rather than merely asked routine biographical questions, before being allowed counsel. Under Escobedo, Krozel had a right to counsel before such questioning occurred. Further, Krozel was decided prior to the Supreme Court's clarification of Escobedo in Kirby.

Even if the APD regulations required that a person in custody be allowed a phone call before incarceration

and within an hour after arrival at the police station, Ward had no Sixth Amendment right to a phone call absent any effort to interrogate him or any action by the APD subject to characterization as the initiation of adversary judicial proceedings.

The Bank relies on the notation on the booking form that Ward had "refused" a phone call to suggest that he would have been confined indefinitely, or interrogated, or subjected to adversarial proceedings, without being granted his phone call privileges. This is pure speculation and therefore raises no genuine issues of material fact that would preclude summary judgment, see Fed.R.Civ.P. 56(c). At the time Ward took his own life, no violation of his Sixth Amendment rights had occurred and

the defendants were therefore properly granted summary judgment on this Section 1983 claim.[2]

B. Eighth Amendment Rights

The theory behind the Bank's Eighth Amendment claim is that Ward had a right to be protected from committing suicide. Allegedly, the denial of a phone call that would have permitted him to communicate with supportive persons, combined with incarceration, drove him to a

[2] The Bank argues that Escobedo and Kirby are distinguishable because they pertain to the right to have counsel present, not the right to place a phone call to counsel. We find no Sixth Amendment right to place a phone call, be it to an attorney or family members. Insofar as the Bank asserts that the denial of the phone call abridged Ward's right to personal emotional security, this claim is only cognizable, if at all, pursuant to the Due Process Clause. See Section II(C) of this opinion, infra.

The Bank also suggests that the booking form was substantially complete, and therefore Ward should have been allowed a phone call. Even if most of the information had been obtained, there is no constitutional requirement that a phone call be permitted upon completion of booking formalities.

suicidal state. Because he was placed in a cell in which he could not be viewed by officers in the booking room, because Ward's cell was not immediately checked upon Stimson's return from dinner, and because the APD monitoring systems failed to alert the officers that Ward was harming himself, the suicide occurred.

In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court held that only "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The standard articulated in Estelle is analogous to that applied by this court in resolving whether an inmate who was

beaten by a fellow prisoner had been deprived of his Eight Amendment rights.[3]

In United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, 414 U.S.1146 (1974), this court considered the Eighth Amendment claim raised by plaintiff Gutierrez pursuant to 42 U.S.C. § 2983.[4] Gutierrez had been beaten with a baseball bat by inmate Bright. Bright had both a history and reputation of violence.

[3] Neither the Supreme Court nor this court has expressly held that there is a constitutional right to be protected from suicide. Because we need not reach that ultimate question in this case, we rely on those cases dealing with harm inflicted on one inmate by a fellow prisoner.

[4] Gutierrez v. Department of Public Safety was one of six civil rights actions against prison officials that was consolidated for decision. All six cases are reported as United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974). We hereafter refer to the relevant portion of this opinion as "Gutierrez" in order to distinguish it from the other five cases involved in the appeal.

Nonetheless, prison officials had not segregated Bright from the other prisoners and had allegedly failed to supervise him adequately while he was in the Mechanical Store where the assault occurred. This court affirmed the dismissal of Gutierrez's complaint, stating that the prison officials had not acted with "such callous indifference . . . that an official intent to inflict unwarranted harm may be inferred." Id. at 719-20.

Gutierrez suggests that the "deliberate indifference" standard of Estelle is met only if there were a strong likelihood, rather than a mere possibility, that violence would occur. As noted in Vun Cannon v. Breed, 391 F. Supp. 1371 (N.D.Cal. 1975), "a guard does not have to believe to a moral

certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take steps to prevent such an assault. But, on the other hand, he must have more than a mere suspicion that an attack will occur." Id. at 1374-75. In short, even though Section 1983 embodies no state of mind requirement, Parratt v. Taylor, 451 U.S. 527, 534 (1981), the Eighth Amendment does.

In the instant case, none of the allegations raises a question of material fact as to whether the defendants had knowledge of, or even any particular reason to suspect, suicidal tendencies on the part of Ward. Camic and Ahlgren knew that Ward was intoxicated, uncooperative, and had attempted to assault them. Knowing that he was

behaving violently, or was acting in a "freaky" manner is not synonymous with having reason to know that the violence might become self-directed. Defendant Stimson can hardly be charged with any knowledge of violent tendencies on Ward's part because Stimson did not know Ward was incarcerated at the APD until he returned from dinner. By that time, Ward had already hanged himself. Further, in removing Ward's belt and shoelaces, the APD did take precaution against the possibility of suicide.

Even if the defendants disregarded one or more of their established procedures, such as checking the cells every hour or effectively monitoring by visual or auditory systems the activities of prisoners incarcerated at a distance from the main booking room, the actions

of the defendants do not constitute deliberate disregard for the possibility that Ward would take his own life. See Christian v. Owens, 461 F.Supp. 72, 77 (W.D. Va. 1978) (finding no Eighth Amendment deprivation even though jailor allegedly failed to search prisoner and prisoner subsequently committed suicide with weapon he had secreted in his boot). The defendants had no actual knowledge that Ward was a suicide risk, and certainly none that he was an unusually high suicide risk, and they did take reasonable precautions to guard against self-infliction of harm. If an Eighth Amendment right to be protected from suicide exists, it was not abrogated in this case because the defendants' lack of knowledge and their exercise of reasonable precautions

precludes any possibility of their actions being characterized as deliberate or callous indifference.

Because no questions of fact material as to whether Ward's Eighth Amendment rights were violated exist, the district judge properly granted summary judgment for the defendants on the Bank's Section 1983 claim insofar as it relied on allegations of Eighth Amendment violations.

C. Fifth and Fourteenth Amendment Rights

The Bank claims that Ward's Fifth and Fourteenth Amendment rights, including a right to personal emotional security and a right to communicate with family members, were violated. Although the Bank is less than specific in its briefs before this court as to which

clauses of the amendments support these claims, only the broad language prohibiting deprivations of life or liberty without due process of law could possibly be the basis of the Bank's claim.

Parratt v. Taylor, 451 U.S. 527 (1981), is particularly relevant to analysis of these claims insofar as they are based purely on the broad language of the due process clause. In Parratt, an inmate sued state prison authorities, pursuant to 42 U.S.C. § 1983, for alleged negligence in losing hobby materials that he had ordered through the mail. Taylor relied solely on a violation of his Fourteenth Amendment right not to be deprived of property without due process of law. The Supreme Court, in a majority opinion authored by

Justice Rehnquist, found both that Section 1983 embodied no state of mind requirement and that misplacing the hobby materials fell within the literal language of the Fourteenth Amendment. The Court held, however, that depriving one of his property is not a violation of the Fourteenth Amendment so long as the victim has recourse to "due process of law." The existence of a state tort remedy, despite the fact that it provided only the possibility of post-deprivation relief and that it precluded recovery against individual defendants, met the requirement of due process and Taylor's Section 1983 claim was therefore no cognizable.

The Bank's due process allegations in this case are arguably distinguishable from Parratt in that Parratt

involved a loss of property rather than an alleged deprivation of life or liberty. In a concurring opinion, Justice Blackmun sought to limit the scope of Parratt to property deprivations, 451 U.S. at 527, and, in a separate concurring opinion, Justice White agreed with Justice Blackmun's reservations, id. We find little indication, however, that such a limitation was endorsed by a majority of the court.[5] Assuming, therefore, that Parratt is applicable to an alleged deprivation of life or liberty, as well as one of property, the Bank's suit is

[5] We refer only to alleged deprivations of the right to due process. This court has previously held that the existence of a state remedy does not foreclose a Section 1983 action alleging deprivation of a substantive constitutional guarantee. Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983) (district court's conclusion that plaintiff's substantive Fourth Amendment rights were violated must not be disturbed on basis of Parratt).

foreclosed because Illinois courts have stated that, in appropriate factual circumstances, its wrongful death statute may provide recovery for one who sues on behalf of the estate of a prisoner who committed suicide. See Dezort v. Village of Hinsdale, 35 Ill.App.3d 703, 342 N.E.2d 468 (1976).

Even if Parratt were interpreted to address only deprivation of property claims under the Fourteenth Amendment, there is considerable Supreme Court authority supporting our view that Ward suffered no deprivation of a due process nature. In his opinion concurring in the result in Parratt, Justice Powell reviewed at length the Supreme Court cases that have implied a due process deprivation requires intentional action on the part of the defendants. 451 U.S.

at 548-50 & nn. 5-8 (citing, inter alia, Baker v. McCollan, 443 U.S. 137 (1979); United States v. Lovasco, 431 U.S. 783, 790 (1977); Paul v. Davis, 424 U.S. 693, 698 (1976)). Other cases have found a due process violation when the challenged conduct was so egregious that it "shocks the conscience." E.g., Rochin v. California, 342 U.S. 165, 172 (1952) (evidence obtained by forcefully administering emetic), cited in Parratt, 451 U.S. at 553 n.11 (Powell, J., concurring in result). Finally, the Parratt decision reaffirms the concern previously expressed by the Court that Section 1983 should not be construed to create a "'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" 451 U.S. at 544 (quoting Paul v. Davis,

424 U.S. 693, 701 (1976); accord, Parratt, 451 U.S. at 544-45 (Stewart, J., concurring); id. at 544 n.13 (Powell, J., concurring in result).

The judge below found that those actions by the APD of which the Bank complains involve "simple negligence at best." Nothing the defendants did was intended to culminate in Ward's suicide and none of their actions could be described as shocking to the conscience. Even if the existence of a state tort remedy applicable to the Bank's grievance does not automatically preclude the existence of a constitutional deprivation in this case under Parratt, the allegations made by the Bank simply do not support the conclusion that Ward was deprived of any Fifth or Fourteenth Amendment due process rights. The

district court therefore properly granted summary judgment for the defendants on the Bank's claims pursuant to 42 U.S.C. § 1983.

D. Pendent State Claim

It is unclear from the record whether Count I of the Bank's complaint, alleging a failure to supervise Ward, was premised on 42 U.S.C. § 1983 or state tort law. The district judge construed the claim as pursuant to Section 1983 and did not address the implications of Illinois tort law.

We also have analyzed the allegations pursuant to Section 1983. If this count were intended as a pendent state claim, however, it was in any event subject to dismissal on summary judgment once the court below determined that the complaint failed to state any federal

claim. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); see Davis v. Murphy, 559 F.2d 1098, 1102 (7th Cir. 1977) (judicial economy dictates federal court should decide merits of pendent state claim if federal cause of action is stated in other count of complaint and evidence regarding pendent claim has been presented). In affirming the dismissal of this count as a pendent state claim, we express no opinion as to whether the Bank's allegations would be actionable under state law except, of course, for our observation that a duty to protect prisoners from suicide has, under appropriate factual circumstances, been recognized under Illinois law, see Dezort v. Village of Hinsdale, 35 Ill.App.3d 703, 342 N.E.2d 468 (1976).

CONCLUSION

Having considered all the arguments urged by the parties to this appeal, we conclude that the district judge correctly found that no genuine issue of material fact precluded summary judgment in favor of the defendants on the Section 1983 claims raised by the Bank. If the Bank intended to plead a pendent claim regarding the alleged failure to supervise Ward during his brief incarceration, that claim was properly dismissed in this federal case. The summary judgment granted the defendants below is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

(2) UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE BANK OF ST. CHARLES, AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER A. WARD, DECEASED,	)	
Plaintiff,	)	
v.	)	No. 79 C 2714
DAVID CAMIC, PATRICK AHLGREN, DONALD STIMSON, DAN PETERSEN, and THE CITY OF AURORA,	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on the motion of the defendants, the City of Aurora and Aurora Police Officers David Camic, Patrick Ahlgren, Donald Stimson and Daniel Petersen, [sic] for summary judgment under Fed. R. Civ. P. 56. Plaintiff brings this suit pursuant to 28 U.S.C. §1983 and 28 U.S.C. §1343 alleging that the defendants

deprived plaintiff's decedent, Christopher Ward, of his rights secured under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Officer Camic arrested plaintiff's decedent in connection with various traffic offenses at approximately 6:00 P.M. on May 28, 1979 in Aurora, Illinois. Officers Ahlgren and Turnbow were dispatched to the scene of the arrest at 6:10 P.M. to assist Camic in transporting Ward to the Aurora Police Station for booking. Upon their arrival at the scene, Ahlgren and Turnbow attempted to place plaintiff's decedent in their squad car. However, Ward became violent and compelled the policemen to place him forcibly in the back seat of their car.

Upon arriving at the station at

6:30 P.M., Ahlgren and Turnbow escorted plaintiff's decedent to the booking area. Ahlgren then attempted to book Ward by filling out a standard Aurora Police Department Booking Form. In accordance with Departmental procedure, Ahlgren informed plaintiff's decedent that he would be allowed to make a telephone call only after he furnished the information required by the booking form. After noting that Ward appeared to be intoxicated and had the odor of alcohol on his breath, Ahlgren asked plaintiff's decedent his date and place of birth, religion, home address and telephone number, and his occupation and place of employment. Ward repeatedly refused to answer the officer's questions, and he apparently demanded immediate use of the telephone.

Ahlgren attempted to persuade Ward

to answer the questions for approximately 10 to 15 minutes, until Lieutenant Olin ordered the officer to escort Ward out of the booking room and down the hall to the cell block, where plaintiff's decedent was to remain until he elected to answer the questions on the booking form. Upon learning that he was to be confined, Ward again became violent and made a threatening gesture at the policemen with his fist, whereupon Officer Turnbow restrained him. Olin, Ahlgren, and Turnbow then dragged Ward out into the hall and down to the cell block.

As the officers placed Ward into an empty cell, Olin ordered Ahlgren to remove the mattress and blanket from the cell bed and to place them in a vacant cell. Having been locked in his cell, Ward removed one of his boots and threw

it at the officers on the other side of the cell door. A moment later, Officer Ahlgren passed by Ward's cell after he had placed the bedding in an empty cell at the opposite end of the block, whereupon Ward spit at him through the bars. All three policemen then left the cell block area.

Although no officers were stationed in the cell block, this room contained an auditory listening device which allowed policemen in the booking area to hear prisoners talking or moving around in the block area. The listening device was operating when Ward was placed in his cell. However, Donald Stimson, the officer regularly assigned to the booking area went on his regular dinner break at approximately the time when Olin, Ahlgren and Turnbow took plaintiff's decedent back to the cell block.

At 7:30 P.M. Officer Stimson discovered plaintiff's decedent hanging by his neck in his cell. Ward had torn his shirt into strips and thus fashioned a noose with which he committed suicide. The State Bank of St. Charles, acting as administrator of Ward's estate, filed the present action on June 29, 1979.

Recovery under 28 U.S.C §1983 must be predicated upon an infringement of a constitutionally protected interest. See, eg., Paul v. Davis, 424 U.S. 693, 700, 96 S. Ct. 1155, 1160 (1976). Consequently, this court must initially determine whether the undisputed facts establish any violations of Ward's constitutional rights upon which the plaintiff may base its claim.

In the present case, the bank contends that Ahlgren's insistance that Ward provide the biographical informa-

tion listed on the booking form before he could make a telephone call constituted a denial of Ward's right to assistance of counsel; that the denial of a phone call caused Ward to take his own life; and that the official customs or policies of the City of Aurora encouraged Ahlgren's refusal to allow Ward to use the telephone. Plaintiff also contends that the officers negligently failed to supervise Ward, thereby permitting him to commit suicide; that this negligence deprived Ward of a protected interest in his bodily security without due process of law and subjected him to cruel and unusual punishment; and that policies or customs of the city promoted the officers' negligence.

A.

In the absence of police interroga-

tion that infringes one's Fifth Amendment guarantee against compulsory self-incrimination, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See, eg., Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 1881 (1972) citing Powell v. Alabama, 287 U.S. 45 (1932). This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. Id. at 688, 92 S. Ct. at 1882. The Powell case makes clear that the right attaches at the time of arraignment, and the Supreme Court has held that it exists also at the time of a preliminary hearing. Id. at 688-89, 92 S. Ct. at 1882. In every case deciding the issue,

the right to counsel has attached "at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 689, 92 S. Ct. at 1882.

In the present case, Officer Ahlgren's refusal to permit Ward to place the telephone call was made prior to the initiation of any adversary criminal proceeding such as a preliminary hearing, indictment, or arraignment. In Kirby v. Illinois, supra, the Court declined to apply the right to counsel to a person involved in a police station showup that took place after the person's arrest but before he had been indicted or otherwise formally charged with any criminal offense. Similarly, Mr. Ward was denied permission to use

the telephone until after he had answered certain questions pertaining to his biographical background; such information was required for routine booking procedures by the police department. This court has found no authority which suggests that the right to counsel attaches while the defendant is being booked at a police station after his arrest.

Moreover, there is no evidence or allegation that Ward was the subject of a custodial interrogation at any time. The questions of the police officers, which Ward refused to answer, exclusively related to biographical data. There is no reason to infer that Ward's Fifth Amendment rights were ever infringed or invoked.

B.

Plaintiff also alleges that

defe..dants deprived the decedent of due process of law and subjected him to cruel and unusual punishment by negligently allowing Ward to commit suicide. Because of those alleged violations of the Eighth and Fourteenth Amendments, plaintiff sues under 42 U.S.C. §1983.

In Paul v. Davis, 424 U.S. 693, 699, 96 S. Ct. 1155, 1159 (1976), the Supreme Court refused to hold that the due process clause of the Fourteenth Amendment and §1983 "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise to state law tort claims." See, eg., Bonner v. Coughlin, 545 F.2d 565, 566 (7th Cir. 1976). Plaintiff does not contend that the officers deliberately allowed Ward to commit suicide in violation of the due

process clause. Rather, plaintiff asserts that their negligence permitted the suicide to occur. Plaintiff has invoked no specific constitutional guarantee against the negligence of the prison guards, even though they might be tortfeasors under Illinois law. Id. at 567. Although "intentional conduct" infringing a person's liberty or property interests without due process of law is within the reach of §1983, that section has not been extended to cover claims based on mere negligence by either the Supreme Court or by the Seventh Circuit Court of Appeals. Id. at 567.

It has been a settled principle of the Eighth Amendment that violent attacks and sexual assaults by inmates upon others while in protective segregation are "manifestly 'inconsistent with

contemporary standards of decency'", and that "deliberate indifference to these happenings constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." See, eg., Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977) citing Estelle v. Gamble, 429 U.S. 97, 102 (1976). "Deliberate deprivation" has been construed to mean either actual intent or recklessness. Id. at 197 n.8. There is no allegation or evidence here that Ward's suicide resulted either from the officers' specific intent to deprive him of his constitutional rights or from their general intent to perform the conduct whose "natural consequence" is the deprivation of Ward's constitutional rights. Id. In one case, for example, prison officials were held liable for injuries inflicted upon an inmate by

other prisoners where the officials had exhibited "deliberate indifference" to plaintiff's right to protection from cruel and unusual punishment by ignoring the inmate's repeated requests for protection. See West v. Rowe, 448 F. Supp. 58 (N.D. Ill. 1978).

In the present case, the allegations suggest nothing which provided notice to the police officers that Ward intended or was inclined to commit suicide. The policemen simply incarcerated their uncooperative and violent prisoner in a cell in order to allow him to calm himself. In the absence of a known danger of suicide, the defendants could only have prevented the suicide had they remained in the cell block with him. Sometime between 6:53 and 7:30 P.M., plaintiff's decedent took his own life. Plaintiff's attempt

to impose upon defendants the burden of absolutely protecting intoxicated prisoners from themselves, with §1983 liability providing the leverage, is not supported by established precedent. See, eg., Christian v. Owens, 461 F. Supp. 72, 77 (W.D. Va. 1978). Because the uncontested facts fail to establish any wrongdoing by the defendants beyond an isolated omission to supervise the prisoner, the claim involves simple negligence at best that does not rise to the level of a constitutional deprivation. Id. at 77.

C.

For the foregoing reasons, the motion of defendants City of Aurora, David Camic, Patrick Ahlgren, Donald Stimson, and Daniel Petersen for summary judgment under Fed. R. Civ. P. 56 is granted.

/S/
Charles P. Kocoras
United States District
Judge

Dated: 10/1/82

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to the following Counsel for Respondent. I further certify that all parties required to be served have been served.

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October 10, 1983